APR 27 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 612.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Appeal From the District Court of the United States for the District of Minnesota.

REPLY BRIEF OF APPELLANT.

F. G. DORETY,
THOMAS BALMER,
FLETCHER ROCKWOOD,
Solicitors for Appellant.

Dated April 23, 1928.

SUBJECT INDEX.

	Page.
We have no adequate remedy at law	2
Mistake of law is a valid ground for equity jurisdiction	11
Commission orders will be canceled for mistake of law	16
Lack of jurisdiction in Commerce Court to enforce money orders will not defeat jurisdiction of district court to enjoin them	20
The remedy under the Urgent Deficiencies Act is not limited to orders made under the Interstate Commerce Act	26
The United States has consented to be sued	30
Conclusion	32
Appendix A.—Extracts from the Hepburn Act	39
Appendix B.—Extracts from the Urgent Deficiencies Act of 1913	42
Appendix C.—Extracts from Debate in Congress in re § 212, Transportation Act of 1920	45

TABLE OF CASES.

Ackerlind v. United States, 240 U. S. 531	31
Alameda County Water Dist. v. Spring Valley Water Co., 67 Cal. App., 533; 227 Pac. 953	5
Arkansas Fertilizer Co. v. U. S., 193 Fed. 667	2, 19
Bridge Co. v. City of St. Louis, 43 Fed. 768	12
Central Ry. Co. v. U. S., 257 U. S. 247	16
Chicago Junction Case, 264 U. S. 258	28
Cohn v. Wemme, 47 Ore. 146, 81 Pac. 981	4

Colorado v. U. S., 271 U. S. 153 28
Cook v. Foley, 152 Fed. 41 (C. C. A., 8th Cir.) 7
Corpus Juris, Vol. 5, Tit. Arb. and Award, Section 468 11
Section 497 8
Dayton Goose Creek Railway v. U. S., 263 U. S. 456 ..... 14, 24, 32
District of Columbia v. Barnes, 197 U. S. 146 31
Frick v. Christian Co., 1 Fed. 250 5
Goff v. Goff (W. Va.), 89 S. E. 9 5
Hartford Fire Insurance Co. v. Bonner Merc. Co., 44 Fed. 151, 56 Fed. 378, 154 U. S. 504 5
Home Furniture Co. v. U. S., 271 U. S. 456 28
Illinois Central R. R. Co. v. U. S., 244 U. S. 81 20
Inter-Mountain Rate Case, 234 U. S. 476 16
I. C. C. v. D. L. & W. R. R., 216 U. S. 531 14
I. C. C. v. Union Pacific R. R., 222 U. S. 541 ..... 14, 16
Jessup and Moore Paper Co. v. Reed and Bro. Co., 10 Del. Ch. 146, 87 Atl. 1011 4
Kendall v. U. S., 12 Pet. 524 3
Levin v. Northwestern Nat'l Insurance Co., 146 Fed. 76 7
Lewis v. Chicago, S. F. & C. R. Co., 49 Fed. 708 5
Los Angeles Switching Case, 234 U. S. 234 16
McFarland v. P. B. & W. R. Co., 37 Wash. Law Rep. 129 38
McLaurin v. McLauchlin, 215 Fed. 345 5
O. W. R. & N. Co. v. S. P. & S. Ry., 83 Ore. 528, 163 Pac. 600 8
P. and R. Ry. Co. v. U. S., 240 U. S. 334 16
Pomeroy Equity Jurisprudence, 3d Ed., Section 919, 1377 9
Procter & Gamble Co. v. U. S., 225 U. S. 282 26

Roberts Bros. v. Consumers Can Co., 102 Md. 362, 62 Atl. 585 5
Rudolph et al. v. Timothy Brosnam, 41 Wash. Law Rep. 755 38
R. C. L., Vol. 2, Tit. Arb. and Award, Section 34.... 8
Shawhan v. Baker, 167 Mo. App. 25, 150 S. W. 1096 6
Skinner and Eddy Corp. v. U. S., 249 U. S. 557..... 15
Southern Pacific v. I. C. C., 219 U. S. 433 .....15, 16
Southern Railway Co. v. U. S., 193 Fed. 664 .....2, 18, 23
Texas v. Eastern Texas R. R. Co., 258 U. S. 204..... 28
U. S. v. Diffenbaugh, 222 U. S. 42 16
U. S. v. Farragut, 22 Wall. 406 12
U. S. v. Jones, 131 U. S. 1..... 31
U. S. v. Milliken Imprinting Co., 202 U. S. 168..... 31
U. S. v. Pennsylvania R. R., 266 U. S. 191..... 15
Utah Construction Co. v. Western Pacific Ry. Co., 174 Cal. 156, 162 Pac. 631 5
Vener v. Michigan Central R. R. Co., 271 U. S. 127 .. 28
Wood et al. v. Chicago, S. F. & C. R. Co., 39 Fed. 52.. 6

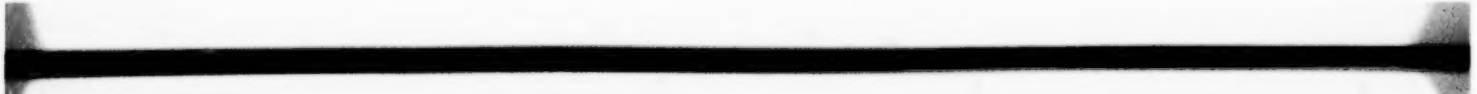
STATUTES.

Statutes at Large:
- 36 Stat. 1135 31
- 39 Stat. 428 29
- Judicial Code, Section 145 31

Act to Regulate Commerce 2
- Section 16 2

Boiler Inspection Act 33
Commerce Court Act 23
Hepburn Act 21, 30
Post Office Appropriation Act of July 28, 1916..... 33
Safety Appliance Act 33
Transportation Act of 1920 34
- Section 209 3
- Section 209(g) 3

Urgent Deficiencies Act of 1913 ..... 23, 26, 2



Supreme Court of the United States

OCTOBER TERM, 1927.

No. 612.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Appeal From the District Court of the United States for the District of Minnesota.

REPLY BRIEF OF APPELLANT.

In the brief filed on behalf of the Interstate Commerce Commission, counsel argues that the guaranty certificates in question here, if they are to be considered as orders of the Commission at all, are at most orders merely for the payment of money which would be enforceable in an action at law. It is argued that whenever the Government may bring such an action we can set up as a defense the errors of law the Commission may have committed in mak-

ing the orders, and that we therefore have an adequate remedy at law, and are not entitled to bring an action on the equity side of the court to set aside the certificates.

The Helpburn Act declares that "jurisdiction to hear and determine" suits to set aside "any order or requirement" of the Commission "is hereby vested" in the Circuit Courts. Whether this was intended to create a right of review in all cases where the Commission's order purported to affect any legal rights of the parties, and regardless of whether an adequate remedy existed at law, is a question that need not be discussed here. The government has contended in the negative, at least in the case of awards of reparation—but the Commerce Court asserted jurisdiction, even in such cases.

Southern Ry. Co. v. U. S., 193 Fed. 664.

Arkansas Fertilizer Co. v. U. S., 193 Fed. 667.

We Have No Adequate Remedy at Law.

Even if this argument would be sound in the case of ordinary reparation awards of the Commission, nevertheless, it is not applicable to these guaranty certificates. It is true that all questions of law can be taken advantage of in defense of a legal action to enforce an award of *reparation*, but this would not be true in an action to enforce a guaranty certificate. It is true in the case of reparation awards because, by the terms of the statute, they are made merely "*prima facie* evidence of the facts therein stated." But this provision is a part of paragraph (2) of Section 16 of the Interstate Commerce Act, and under the terms of paragraph (1) it is applicable only where "the Commission shall determine that any party

complainant is entitled to an award of *damages under the provisions of this act for a violation thereof.*" (Italics ours.)

Section 209 of the Transportation Act, which contains the guaranty provisions, is not a part of the Interstate Commerce Act, so that the guaranty certificate is not an award of damages under the provisions of the Interstate Commerce Act for a violation thereof. It is not an award of "damages" at all, nor does it involve a "violation" of the Interstate Commerce Act, or of any other act. Therefore, paragraphs (1) and (2) of Section 16 of the Interstate Commerce Act, do not apply to Guaranty Certificates, and there is no provision of any other statute making them merely *prima facie* evidence of the facts therein stated. On the contrary, Section 209 (*g*) of the Transportation Act provides:

> "The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty of each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated."

It will be noted from the above that the certificate in itself makes it the duty of the Secretary of the Treasury to draw warrants. If he should refuse to do so, mandamus would lie. *Kendall v. U. S.*, 12 Pet. 524.

If the certificates of 1925 and 1926, which are in question here, are not erroneous in law, and if the Commission

had jurisdiction to make them, we take it that they would be conclusive upon us in an action by the Government to enforce a refund. They would in themselves constitute a cause of action or fix the amount of recovery, and we could not relitigate questions of fact, nor could we ask the court to make a computation of its own. In this respect, they have an effect similar to that of Commission orders fixing future rates, which, under paragraph (12) of Section 16, are enforceable at their face value, if "regularly made and duly served." Such orders are more than merely *prima facie evidence* of the facts which they state.

In this respect, also, Guaranty Certificates would seem to be analogous to an award of arbitrators, to an architect's certificate under a building contract, or to an appraiser's finding of value under an insurance policy.

It is well settled that mistake of law in the making of such awards or certificates is never a defense which can be set up in an action at law brought to enforce them. It is not always that a mistake of law affords a valid ground for attack against an award, but whenever it is a valid defense, it is well settled that it can only be availed of by an equitable proceeding for the cancellation of the instrument. For example, a failure of arbitrators to hear and consider proper evidence cannot be set up as a defense in an action at law, and there is, therefore, no adequate remedy at law in such a case. *Cohen v. Wemme*, 47 Or., 146; 81 Pac. 981.

In *Jessup and Moore Paper Co. v. Reed and Bro. Co.*, 10 Del. Ch., 146; 87 Atl. 1011, the defense was that the award was invalid because of the receipt of evidence through an improper channel. On page 1012, the court said:

> "It is clear that the court of chancery has jurisdiction and is the proper and only tribunal to hear and determine whether the award should be set aside, inasmuch as the reasons urged therefor by the bill are not available as a defense to an action at law on the award. *Russell on Arbitrators*, 509."

In *Hartford Fire Insurance Co. v. Bonner Mercantile Co.*, 44 Fed. 151, one of the arbitrators had failed to comply with proper procedure. The court held that this would not be a legal defense, saying:

> "Where the arbitrators are guilty of misconduct which does not affect what may be called their 'jurisdiction' and which does not appear on the face of the award, that is prior to the statutes above named" (permitting equitable defenses to be pleaded in law actions), "the award could be set aside only in a court of equity upon a proper bill."

This was affirmed by the circuit court of appeals in 56 Fed., 378, without discussion of this point, and certiorari to the Supreme Court of the United States was denied in 154 U. S., 504.

Other cases in which courts of equity have sustained jurisdiction to cancel an award because of errors of law, or errors in considering improper evidence, or failing to consider proper evidence, are the following: *Roberts Bros. v. Consumers Can Co.*, 102 Md., 362, 62 Atl., 585; *Frick v. Christian Co.*, 1 Fed., 250; *Goff v. Goff* (W. Va.), 89 S. E., 9; *Alameda County Water Dist. v. Spring Valley Water Co.*, 67 Cal. App., 533, 227 Pac. 953; *Lewis v. Chicago, S. F. & C. R. Co.*, 49 Fed., 708; *Utah Construction Co. v. Western Pacific Railway Co.*, 174 Cal., 156, 162 Pac., 631; *McLaurin v. McLauchlin*, 215 Fed., 345. Even where there are statutory provisions for enforcing awards,

and where the statute permits of an equitable defense in such action based on fraud, it has been held that the statutory remedy was cumulative merely, and not exclusive, and that resort to equity is not impaired or curtailed by the statutory remedy. *Shawhan v. Baker*, 167 Mo. App., 25, 150 S. W., 1096.

The same rule, that the award or certificate can be set aside only in an action at equity, and that irregularities not appearing on its face cannot be availed of in a defense of an action at law, is applied in cases where the attack is based, not upon mistake of law, but upon fraud, mistake of fact, or other equitable grounds. In *Wood et al. v. Chicago, S. F. & C. R. Co.*, 39 Fed., 52, the court said:

> "Such provisions in contracts being binding, the next question is whether an estimate made by an engineer in accordance with such a stipulation can be avoided in a strictly legal proceeding by proof of fraud, gross negligence, or mistake? Of course, if an estimate thus made is regarded in the light of an award made by an arbitrator, the authorities are practically all one way,—that recourse must be had to a bill in equity, and that neither fraud nor mistake can be alleged or proven to avoid the estimate, in a suit at law on the contract to recover a balance claimed to be due. The best-considered cases on the subject, so far as my observation extends, treat estimates (especially final estimates) made by an engineer in pursuance of such provisions, as an award that can only be avoided in chancery. *Herrick v. Railroad Co., supra; Kidwell v. Railroad, supra; Railroad Co. v. Veeder, supra; Grant v. Railroad Co.*, 51 Ga., 353.
>
> "In several cases, bills have been entertained to avoid erroneous estimates on the ground of fraud and mistake, without a question as to the propriety of such a procedure, and, if equity has jurisdiction in such

cases, it is clear that a court of law has not. *Vide* cases above cited, and *Sharpe v. Railway Co.*, L. R., 8, Ch. 597."

In *Lerin v. Northwestern National Insurance Co.*, 146 Fed., 56, the court said:

"Whether or not an award of arbitrators may be successfully assailed in a court of law is a question upon which there is some confusion in the authorities. This arises mainly, if not wholly, from the fact that under the reformed procedure awards have been defeated upon equitable grounds in law actions; but this is because equitable defenses are permissible in such actions under the Code. While it has long been settled that courts of law have concurrent jurisdiction with courts of equity in matters of fraud, yet in the national courts, where legal and equitable remedies cannot be blended in one proceeding, it is generally held that relief against awards or other instruments in writing importing a consideration, upon the grounds of fraud, which does not touch the execution of the instrument, must be obtained in equity."

In *Cook v. Foley*, 152 Fed., 41 (C. C. A. 8th Cir.), the court said:

"Again, final estimates made by engineers in pursuance of a contract between the parties making such estimates final and conclusive when made the foundation of an action at law, or when interposed as a defense to an action at law, cannot be assailed in such action for fraud, such gross mistakes as imply bad faith, or a failure to exercise an honest judgment on the part of the arbitrators, or other like extrinsic matters, if objection to such method of attack be timely made; *but for such relief* resort must be had to a court of equity" (citing among other cases, *Wood v. Ry.*).

"Not only has this precise question been ruled, but the very fact that courts of equity have invariably assumed jurisdiction to determine the validity of estimates made by engineers in pursuance of contracts making their findings final, conclusive, and binding between the parties when sought to be impeached for fraud or other extrinsic matters, is conclusive evidence that a court of law has no jurisdiction over such matters if objection thereto be timely made, for, of necessity, if a court of law possesses such jurisdiction a court of equity does not, for in Federal courts the distinction between actions at law and suits in equity, and between legal and equitable defenses is fundamental and jurisdictional. An equitable defense is not admissible in an action at law."

See, also, *O. W. R. & N. Co. v. S. P. & S. Ry. Co.*, 163 Pac., 600; 83 Or., 528.

In 2 R. C. L., 389, title "Arbitration and Award," Section 34, a distinction is drawn between awards which are absolutely void and those which will be set aside for cause shown.

"The second class consists of those cases in which the awards are valid on their face and made after proper proceedings, but the arbitrators have been guilty of fraud, misconduct, partiality, or, in some instances, of mistake. The general rule is that these extrinsic defects may not be proven in an action at law, but in equity they are proper grounds for setting aside the award."

In 5 *Corpus Juris*, title "Arbitration and Award," Section 497, page 195, it is said:

"A court of equity has jurisdiction over awards to restrain the enforcement thereof and to set them aside in the ordinary cases of fraud, corruption, and mistake, or other extraneous causes going to their validity."

The rule seems to be that awards or certificates of this character are treated like contracts, deeds, wills, or other written instruments which are effective in actions at law at their face value. If they are subject to attack at all for mistake of law or fact, fraud, or other grounds not appearing on the face of the instrument, the remedy must be by equitable action for cancellation, reformation, or injunction.

Professor Pomeroy, in his work on Equity Jurisprudence, affirms the jurisdiction in courts of equity to set aside awards, among other instruments, for mistake, fraud or other equitable grounds.

In Section 919, Volume 2, 3rd Edition, under the heading of "Equity Jurisdiction based on Fraud," the author says:

> "The jurisdiction to set aside and cancel awards was settled at a very early day, and it still exists, except so far as it has been regulated or taken away by statute."

In Volume 4 of the same edition, Section 1377, in a chapter on "Reformation and Cancellation," the author says:

> "The jurisdiction of equity to grant the remedy of cancellation exists and will always be exercised when it is necessary to protect or maintain equitable primary estates, interests, or rights; where, however, the estate, interest, or right is legal, the jurisdiction always *exists*, but its exercise depends upon the adequacy of the legal remedies—a party being left to his affirmative or defensive remedy at law, where full and complete justice can thereby be done. The occasions giving rise to the exercise of this jurisdiction are mistake, fraud, and other instances where enforcing instruments or agreements would be inequitable or un-

> just. A doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and cancelled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference, but it is now well settled that jurisdiction will be exercised in such cases, except where the invalidity of the instrument is apparent on its face. The particular instances in which this remedy is most often given are instruments concerning land, and negotiable paper before maturity, the legal remedies in these cases being, as a general rule, inadequate. The remedy is also frequently given in case of bonds, policies of insurance, settlements and compromises, awards, and judgments."

A great many English equity cases as well as a number of American cases are cited in the footnotes to these sections, and leave no doubt of the proposition that where a defense to an award exists, not appearing on its face, the remedy is by a proceeding in equity.

Whether and when mistake of law affords a ground for attack against an award is another question. The above authorities are cited to the proposition that *assuming that a ground for attack exists*, the *proper form of remedy is in equity*. There can be no doubt under these authorities that if the guaranty certificates of the Commission are subject to attack for errors of law, an equitable action is the proper form in which to make such attack. Whether the guaranty certificates are subject to attack on the grounds set up in our petition, or whether they are impregnable against all attack in any form whatever, is another question which we shall discuss next. For the present we are

citing the above authorities merely to show that if the right to attack exists at all, an action in equity is the proper remedy. This is so thoroughly established by the above authorities that there can scarely be any controversy as to this question.

Mistake of Law is a Valid Ground for Equity Jurisdiction.

We come then to the question whether these guaranty certificates are subject to attack for errors of law, or whether they are impregnable against any attack in any form of action.

There are a great many cases holding that mistake of law is not sufficient ground for attacking an award. The rule seems to be that where the settlement of the controversy is to be determined by the sense of fairness of the arbitrators, rather than by rules of law, the award is not subject to attack for mistake of law. But where it is intended that the arbitrators are to be governed by rules of law in making their determination, it is well settled that the award may be set aside in equity for mistake of law. In 5 *Corpus Juris*, under "Arbitration and Award," Section 468, page 183, the ruling is stated as follows:

> "Whenever the arbitrators are required, by the terms of the submission or by statute or rule of court under which the arbitration proceeds, to determine the rights of the parties according to law, a plain mistake in their construction of the law is sufficient ground upon which to avoid the award The reason is that, the arbitrators having mistaken the law which they were presumed to understand, the decision is not within the scope of their authority as determined by the submission, and is therefore void.

> "*When not required to follow the law* (*aa*) GENERAL RULE. In the absence of a special requirement, the arbitrators are not bound to decide according to law, and, therefore, in such case, a mistaken construction of the law has been held not sufficient ground of avoidance of an award except it is made clearly to appear that the arbitrators intended to decide according to law, or unless it is shown that the misconstruction of law is so perverse as to work manifest injustice."

In *United States v. Farragut*, 22 Wall., 406, the court said:

> "The award was also liable, like any other award, to be set aside in the court below, for such reasons as are sufficient in other courts. For exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all the reasons on which awards are set aside in courts of law or chancery."

In *Bridge Co. v. City of St. Louis*, 43 Fed., 768, it is said:

> "If it appears that the engineer in charge put a wrong construction on any provision of the contract, the court will correct any substantial error resulting from such mistake, for the reason that the parties did not make the decision of the engineer as to the proper interpretation of the contract, final and conclusive. It is the province of the court to construe the agreement."

The guaranty certificates, in so far as they may be subject to the rule governing awards, would seem to be analogous to those awards in which the controvery is to be determined according to rules of law, rather than according to the uncontrolled sense of fairness or judgment of

the arbitrators. If the Commission had allowed compensation for nine months instead of six months, the Government would surely have some redress, and, under the authorities above cited, the proper redress would be in a court of equity. And if such errors of law are not binding upon the Government, no more can they be binding upon the carriers. In addition to the provision that the compensation shall be for six months, there are other provisions of the statute which seem to be equally binding upon the Commission. One of them is that the compensation is to be based on the amount of Federal control rental. In the opinion of the Commission, and as a matter of fairness, the carrier might be entitled to more or less than this, but the Commission has no power to substitute its own judgment in the matter for that of Congress. The statute prescribes also that the carrier shall be allowed interest upon the cost of additions and betterments made with the approval of the President during Federal control. If it arbitrarily and deliberately substitutes its own judgment as a matter of fairness, for what the statute requires, the certificate is certainly subject to attack in some form.

If the Commission, after having made a final certificate and having thus exhausted its jurisdiction should, years after the money has been paid, attempt to execute another instrument purporting to be a final certificate for a smaller sum, and calling for a refund, it might perhaps be held that lack of jurisdiction to make the latter certificate is an objection which appears upon the face of the instrument, and that it would, therefore, be available as a defense in an action at law. But even if it be held that this one ground of attack would be available as a defense in an

action at law, the same would not be true of the other errors of law which we allege, none of which appear on the face of the instrument. The certificates themselves do not show that the Commission arbitrarily failed to include an allowance of interest upon the full cost of additions and betterments made during Federal control, nor do they show that the Commission committed the other errors of law alleged in our petition. Consequently, the remedy at law is inadequate for the presentation of all of our grounds of attack, and we must resort to equity for a complete adjudication of the controversy, if the authorities dealing with awards of arbitrators are to be followed.

Moreover it appears from the quotation from Pomeroy, *supra*, that under the later cases, equity jurisdiction will be sustained, even though the instrument may be utterly void. And this Court has sustained the equity jurisdiction in attacks on Commission orders, even where the ground of attack was unconstitutionality of the statute, and that the order was void for lack of authority.

Dayton Goose Creek Ry. Co. v. U. S., 263 U. S., 456.
I. C. C. v. D. L. & W. R. R., 216 U. S., 531.

In *I. C. C. v. Union Pacific R. R.*, 222 U. S. 541, at 547, this court, in enumerating the grounds upon which orders of the Commission might be set aside, said:

> "There has been no attempt to make an exhaustive statement of the principles involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; * * *."

This seems to recognize that an order which is a nullity can be set aside by the court upon that ground.

In *Skinner and Eddy Corp. v. United States*, 249 U. S. 557, at 562, this Court said:

> "The contention is that the Commission has exceeded its statutory powers, and that hence the order is void. In such a case, the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

In United States v. Pennsylvania R. R. Co., 242 U. S. 208, the court enjoined an order of the Commission requiring the carrier to provide and furnish oil tank cars, the sole ground being that the Commission was without statutory power to make such an order and that it was, therefore, a nullity.

In Southern Pacific Co. v. I. C. C., 219 U. S. 432, the Commission had attempted to substitute for what it admitted to be a just and reasonable rate, a lower rate based upon what the Commission conceived to be a proper business policy. On page 44, the court said:

> "Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumptin by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

It would seem to follow from these decisions that the jurisdiction would be sustainable in the case at bar, even if our sole ground of attack were our contention that these Guaranty Certificates were nullities.

MISTAKE OF LAW IS A SUFFICIENT EQUITABLE GROUND FOR CANCELLATION OF COMMISSION ORDERS.

Whatever the rule may be as to setting aside awards of arbitrators for mistake of law, this Court has certainly settled the rule that mistake of law is sufficient equitable ground for setting aside orders of the Commission. *Interstate Commerce Commission v. Union Pacific R. R.*, 222 U. S., 541. *Inter-Mountain Rate Case*, 234 U. S., 476. *Los Angeles Switching Case*, 234 U. S., 234. *U. S. v. Pennsylvania R. R.*, 266 U. S., 191. *Southern Pacific v. I. C. C.*, 219 U. S., 433. *U. S. v. Diffenbaugh*, 222 U. S., 342. *P. & R. Ry. v. U. S.*, 240 U. S., 334. *Central R. R. v. U. S.*, 257 U. S. 247.

It is true that these cases involve rate orders. But for the purposes of equity jurisdiction, Guaranty Certificates must be put in the same class, not with other money orders, but with rate orders, because both Guaranty Certificates and rate orders are enforceable at face value if regularly made—and because, as to neither of them can mistake of law be set up as a defense in an enforcement action in a court of law. Ordinary reparation awards—that is awards of "damages" for a "violation" of some provision of the Interstate Commerce Act may perhaps be distinguished from the cases enjoining rate orders. But if so, it is not because they are orders for the payment of money, but because the statute expressly limits this kind of money orders, and this kind only, to prima facie weight, and so provides an adequate remedy at law.

The enforcement of Guaranty Certificates is not provided for under Section 16 of the Interstate Commerce Act, but is provided for by the general rules of procedure

governing the enforcement of awards of arbitrators. And these general rules of procedure provide, as to Guaranty Certificates, exactly what Section 16 provides as to rate orders, i. e., they are enforceable at face value if regularly made. Neither Section 16 of the Interstate Commerce Act, nor the common law rules which are applicable, limit Guaranty Certificates to prima facie weight, or permit a mistake of law to be pleaded as a legal defense against their enforcement.

The fact that Guaranty Certificates call for the payment of money instead of establishing future rates is immaterial. In deciding what orders are governed by the principle of the cases enjoining rate orders, the test must be, not the character of the thing ordered but the method of enforcing it. If rate orders, like money awards, were given only prima facie weight by the provisions of the enforcement statute—if mistake of law in the making of a rate order could be set up as a defense to an enforcement action in a court of law—in other words, if an adequate remedy at law existed to the same extent in the case of rate orders as in the case of money orders—then the same rules as to cancellation in equity should govern both. On the other hand, if Commission awards of money, including awards of "damages" for "violation" of the Interstate Commerce Act, were made enforceable, like rate orders, at their face value "if regularly made", then the remedy at law would be alike inadequate as to both kinds of orders; and the same rule as to cancellation in equity should govern both.

There is no logical distinction so far as the character of the orders or so far as the functions of the Commission are concerned, between an order finding that a given rate

will be unreasonable in the future and an order finding that the same rate has been unreasonable in the past, and ordering reparation. Both involve the exercise of the administrative functions of the Commission, and of its expert judgment in determining what rates are reasonable. The only distinction between them is the fact that as to this particular kind of money orders, and this kind only, Section 16 limits them to prima facie weight. What makes rate orders enjoinable, therefore, is not the fact that they are orders "other than for the payment of money" but that the fact that they are enforceable "if regularly made."

Under all of these tests, Guaranty Certificates fall within the class of orders which are enjoinable for mistake of law. The principle, established in the cases enjoining rate orders, that mistake of law is a sufficient ground of equity jurisdiction, applies just as fully to Guaranty Certificates as to rate orders.

We have been arguing the question so far as though it were conceded that in the case of reparation orders, the remedy at law is complete and that there is no jurisdiction in equity. We have pointed out that even if this be the rule as to reparation orders, it would have no application to guaranty certificates. However, it is not at all certain that this contention of the Government is sound, even as to reparation orders. This question was presented to the Commerce Court in *Southern Railway Co. v. U. S.*, 193 Fed., 664, which was an action under the Commerce Court Act to set aside an order awarding reparation. In that case the Government made the same contention that is made here, and the Court said:

"The language which defines an order which may be affected by decree of this Court is unrestricted; 'any order' which is involved in a direct suit to enjoin, set aside, annul, or suspend, provided always it is a case where a circuit court formerly possessed jurisdiction to annul, set aside, or suspend. And that prior to June 18, 1910, the circuit courts had jurisdiction is evident, for the language of Section 16 of the Interstate Commerce act, as amended by the Hepburn Act of June 29, 1906, expressly vested in such courts power to hear and determine suits to enjoin, set aside, annul, or suspend any order of the Commission. We cannot read into the clause which confers jurisdiction upon this Court words of limitation other than those which formerly circumscribed the powers of the circuit courts, nor can we except from the described kinds of cases, where injunction, annulment, or suspension may be had orders for the payment of money. The fundamental principle that Congress is presumed to have expressed its meaning with due deliberation, and that it is not within the power of the court to go beyond the plain expressions of the legislature, prevents the court from holding otherwise.

"We need go no further now than to hold that since the approval of the act creating this Court, a carrier which is ordered to pay damages and which could have gone to the circuit court in equity to have such an order annulled or enjoined, has now the right to ask this Court to enjoin or annul or suspend such an order, provided always it can show grounds for equitable relief. And as the jurisdiction of this Court over such a case is exclusive, it follows that no other court can entertain a bill in equity for the direct purposes of annulment or suspension as aforesaid."

A similar rule was adopted by the Commerce Court in *Arkansas Fertilizer Co. v. U. S.*, 193 Fed., 667.

In the former case the court indicated that the remedy of law was not entirely adequate, saying:

> "It is plain, however, that if such a defense is sustained in the circuit court, their ruling does not thereby affirmatively annul and set aside an order of the Commission; it merely determines that as between the parties before it, the order is not a valid, legal basis for the particular claim sought to be enforced."

We believe that this reasoning, and the plain and specific provisions of the statute, support these decisions of the Commerce Court, and that an action will lie to set aside an order of the Commission, even though it be a mere reparation order. It seems unnecessary to argue this question at further length, however, because, whether or not the rule will be sound as applied to ordinary reparation orders which carry only *prima facie* weight, it certainly applies to guaranty certificates which carry as much weight as future rate orders.

LACK OF JURISDICTION IN COMMERCE COURT TO ENFORCE MONEY ORDERS WILL NOT DEFEAT JURISDICTION OF DISTRICT COURT TO ENJOIN THEM.

Counsel for the Commission argues that under the Commerce Court Act the Commerce Court had no jurisdiction whatever to enforce orders for the payment of money, this jurisdiction being left in the circuit court. He then quotes, on pages 24 and 25 of his brief, from Illinois Central R. R. Co. v. U. S., 244 U. S., 81, which says that "the power of a court to stay the enforcement of an illegal order is in a sense reciprocal to its power to enforce compliance with an order of the Commission if lawful." Counsel argues from this that since the Commerce Court

could not enforce a guaranty certificate, since it is a certificate for the payment of money, therefore, it cannot enjoin one.

We believe that there are two very definite fallacies in this reasoning. The first is that the alleged order involved in the Illinois Central case was an order setting a case for hearing. It was unenforceable, not only in the Commerce Court, but in any other court. Injunction was denied, not because that particular court would have no jurisdiction to enforce such an order, but because it is not the kind of an order that would be enforceable in any court.

The second fallacy in counsel's argument lies in the fact that the Commerce Court Act expressly declares that the injunction powers of the Commerce Court are the same as the injunction powers previously exercised by the circuit court under the Hepburn Act. Therefore, if the scope of these injunction powers are reciprocal to and limited by the scope of the enforcement power of any court, the limitation must lie in the enforcement powers of the circuit court under the Hepburn Act, and not in the enforcement powers of the Commerce Court under the Commerce Court Act.

The original provisions of the Hepburn Act, in so far as they are relevant, are printed as Appendix "A" of this brief. Pertinent extracts are as follows:

> "If a carrier does not comply with an order for the payment of money * * * the complainant * * * may file in the Circuit Court of the United States * * * a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like all other civil suits for damages,

except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, * * *.

"If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, * * * any party injured thereby, or the Commission in its own name, may apply to the circuit court * * * for enforcement of such order. * * * If upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order * * *.

"The venue of suits brought in any of the circuit courts * * * to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office. * * *; and jurisdiction to hear and determine such suits is hereby vested in such courts."

It clearly appears from these provisions of the Hepburn Act that the circuit courts had jurisdiction of actions to *enforce* orders for the payment of money, as well as orders other than for the payment of money, and that on the other hand, they had jurisdiction to *enjoin* "any order or requirement" of the Commission. Therefore, under the rule in the Illinois Central case, that injunction powers are reciprocal to and coextensive with enforcement powers, the circuit court had power to enjoin orders for the payment of money. Under the Commerce Court Act, the injunctive powers of the Commerce Court are those "possessed by circuit courts of the United States and the judges thereof, immediately prior to June 18, 1910." Under

the Urgent Deficiencies Act of 1913, "the jurisdiction vested in said Commerce Court by said Act '(the Commerce Court Act)' is transferred to and vested in the several district courts of the United States." A more complete extract of the pertinent provisions of this Act is printed as Appendix "B" to this brief. It, therefore, appears that under the rule quoted from the Illinois Central case, and under the argument made by counsel for the Commission, jurisdiction to enjoin orders for the payment of money was vested in the circuit court, and the same jurisdiction has descended through the Commerce Court to the present district courts.

This same argument was presented to the Commerce Court in *Southern Railway Co. v. U. S.*, 193 Fed., 664, *supra*, and the court said:

> "We are urged to adopt the view that when Congress excepted from the kinds of cases over which the Commerce Court may exercise jurisdiction the enforcement of an order for the payment of money, it could not have intended to authorize us to annul such an order; and it is said that when the circuit court tries an action at law to enforce such an order, that court necessarily has power to deny relief, on the ground that the order is illegal and void, and that therefore there is a destruction of that clause of the act which makes the jurisdiction of this court exclusive over cases to annul any order of the Commission. The difficulty with this reasoning lies in confounding these two propositions: On the one hand, an express affirmative denial of power to this Court to try an action sounding in tort as does one to recover damage for excesses of rates collected as ordered by the Commission, wherein right of trial by jury must be preserved; and, on the other hand, an express grant to this Court of exclusive authority to hear and

decide a petition brought to annul or enjoin an order of the Commission. No suit having for its purpose the annulling of an order for the payment of money is brought in the circuit court, and none can be; the jurisdiction of this Court being exclusive in actions of that kind. The case in the circuit court is one to recover damages upon an order duly made by the Commission. True, a defense, among others available, may involve the validity of the orders upon which plaintiff bases his action; but we need not dwell upon what questions may be presented in the circuit court, for we have no jurisdiction over them. It is plain, however, that if such a defense is sustained in the circuit court, the ruling does not thereby affirmatively annul and set aside the order of the Commission; it merely determines that as between the parties before it the order is not a valid legal basis for the particular claim sought to be enforced. In actual practice, where law and equity courts are invoked, there may arise some opportunity for varying views upon the validity of an order of the Commission. Surely, though, instances of divergencies will not happen more often than they do under any system where separation of law and equity obtains, and in any event are not of such serious apprehension as to justify a construction of the statute which would subtract from the lawful authority deliberately conferred by Congress upon this Court exclusively to enjoin, set aside, annul, or suspend, in whole or in part, 'any order' of the Commission."

If the district court has no jurisdiction to set aside an order for the payment of money, then it had no jurisdiction to set aside the order referred to in *Dayton Goose Creek Railway Co. v. U. S.*, 263 U. S., 456. The Commission order involved there was an order under the recapture clause, directing the carrier to pay to the Government

one-half of its excess earnings. Counsel for the Commission argues on page 27 of his brief that this was a mere request, and not an order that would be enforceable or would entail penalties.

Exhibit B to the petition (record page 22) in that case contains the following wording, "it is ordered that * * * each and every carrier by railroad * * * shall * * * report to the Secretary of the Interstate Commerce Commission the following matters:" The order then proceeds to enumerate matters to be reported, including a statement as to whether one-half of the excess has yet been paid. It then proceeds, "if the latter amount is unpaid it should be paid by remittance * * *." It will be noted from this that the carrier is "ordered" to submit a report showing its excess, and admonished that one-half of the excess "should be paid by remittance."

Exhibit E to the petition in that case (Record, page 44) is a letter from the Commission's director to the carrier advising that its returns show a total amount due the Government of $55,433.23, and saying "you are again requested to fully comply with the *orders* (italics ours) by * * * remitting promptly to the Secretary of the Commission the remaining one-half of the excess income so preliminarily computed." Paragraph 10 of the petition (Record, page 6) alleges the foregoing letter to be a demand of the Commission.

It is only upon the theory that this was an "order" that the jurisdiction could be sustained at all, and the only effect that this particular order could have was the payment of money. If all that was involved was a mere request, it would not be subject to injunction, nor would it afford a basis for any other form of action. If coun-

sel's argument is sound, to the effect that there is always an adequate remedy at law in such cases, and that the existence of an adequate remedy at law will defeat an equitable action, it would seem that such an argument would have been as effective in the Dayton Goose Creek case as it is here.

THE REMEDY UNDER THE URGENT DEFICIENCIES ACT IS NOT LIMITED TO ORDERS MADE UNDER THE INTERSTATE COMMERCE ACT OR AMENDMENTS THERETO.

Counsel for the Commission argues that the only "orders" covered by the Commerce Court and Urgent Deficiencies Act are orders made by the Commission in pursuance of powers conferred by the Interstate Commerce Act. In support of this, on pages 15 and 16 of his brief, he quotes from *Procter & Gamble Co. v. U. S.*, 225 U. S., 282, to the effect that "the Commerce Court was intended to be but a part of the existing system for the regulation of interstate commerce."

The question involved in the Procter & Gamble case was whether, after a "negative" order of the Commission, that is after its failure to grant affirmative relief, the Commerce Court might assume the Commission's function, and itself grant affirmative administrative relief, by an order which, while in the form of an injunction, would really require the Commission to take affirmative action.

There was no question involved as to whether an order on some subject other than the regulation of commerce could be enjoined. The question was as between a mere power of *negative* injunction, which was permissible under the existing system, on the one hand, and on the other, a power of injunction involving affirmative relief, which

would have been a change in the existing system. *Both* would have involved a regulation of commerce.

When the Court said that the Commerce Court Act was not intended to change the existing system for the regulation of commerce, it was emphasizing "existing system" and not "regulation of commerce." It would have expressed the same thought if it had said that there was no intention of changing the existing system for the discharge of whatever functions might be entrusted to the Interstate Commerce Commission. There was clearly no thought of declaring that the injunctive power of the Court, over Commission orders, were limited to orders made under the Interstate Commerce Act. That question was not before the Court, and there was nothing in the Proctor and Gamble case either to suggest such a question, or to call for an answer to it.

It was just as true of the Commission itself, as it was of the Commerce Court, that it was a body organized primarily for the regulation of commerce. But this did not prevent Congress from expanding the powers of the Commission. The only limits of the Court's field of action were those imposed upon the Commission. And as the Commission's field of action was expanded, there seems to be no reason why its enlarged limits should not continue to mark the limits of the Court's functions.

That the Commerce Court Act was effective to give the Court power to enjoin orders of the Commission, other than orders made under its then existing powers, is made plain by several decisions of this Court.

Additional powers were thereafter conferred upon the Commission, such as the power to permit the issue of securities, and the power to permit the construction,

acquisition or abandonment of lines of railroad. In all of these cases it has been held that the certificate of the Commission is an "order" within the meaning of the Commerce Court and Urgent Deficiencies Act, notwithstanding the fact that it is issued under provisions which were not a part of the law when the Commerce Court Act was passed. *Venet v. Michigan Central Railroad Co.*, 271 U. S., 127; *Colorado v. U. S.*, 271 U. S., 153; *Texas v. Eastern Texas Railroad Co.*, 258 U. S., 204; *Home Furniture Co. v. U. S.*, 271 U. S., 456; *Chicago Junction Case*, 264 U. S., 258.

We have seen from the cases on awards, cited in the early part of this brief, that an equitable action would be the proper remedy for the correction of mistakes of law in certificates such as these guaranty certificates, even though the Hepburn Act, the Commerce Court Act, and the Urgent Deficiencies Act had never been passed. Aside from the the question whether the United States can be sued (which will be discussed a little later), the cause of action which we are invoking is one which would have arisen from fundamental equitable principles, even if there were no express statutes upon the subject. This being the situation, the Hepburn Act was passed in 1906, providing that this particular form of equitable action, whenever it involved orders made by the Commission, should be brought in the circuit court (now the district court).

If this cause of action had been created for the first time by the Hepburn Act, counsel's argument might have more force. But it was not. The cause of action arises from general and long-existing equitable principles. The Hepburn Act simply provided that whenever actions of

this character should involve orders of the Commission, they should be brought in a certain court in a certain way. This provision is not limited in terms to orders made under the Interstate Commerce Act, and while it is no doubt true that the Commerce Court was created to supplement the existing system of regulating commerce, it would be a far-fetched deduction to conclude that the broad term "any order or requirement" in the Hepburn Act does not mean what it says, but means instead "any order made under the Interstate Commerce Act."

Suppose, for example, that the Commission should make an order fixing rates for the transportation of United States mails by railroad. Such an order would have to be made under the Postoffice Appropriation Act of July 28, 1916 (39 Stat., 428). This act is neither an amendment to or a part of the Interstate Commerce Act, and yet, if counsel's argument is sound, an action to set aside such an order could not be brought under the terms of the Hepburn Act, even though it specifically covers "any order or requirement of the Commission."

At the time the Transportation Act was passed, the Commission was an organized body with existing rules of practice, existing methods of procedure, and an existing process for review of its orders by injunction. Knowing all this, Congress entrusted to the Commission the power to make the orders in question. One of the well-known characteristics of this body upon which the power to make these certificates was conferred was its subjection to review by injunction. We may safely assume that if Congress had intended that the setting aside of these orders for mistake of law was not to be subject to the usual form of procedure applicable to all other orders

of the Commission, it would have said so. In the absence of such an expressed exception, it must be assumed that the usual form of procedure was to apply. It first declared, in the Urgent Deficiencies Act, that all orders of the Commission should be enjoinable. It then declared, in the Transportation Act, that the amount of the guaranty should be determined by order of the Commission. There would seem to be no escape from the conclusion that the remedy under the Urgent Deficiencies Act is not confined to orders made under the Interstate Commerce Act, but is applicable to orders made under the Transportation Act or under any other act of Congress.

THE UNITED STATES HAS CONSENTED TO BE SUED.

Granting that action would lie in equity against an individual to set aside an award for mistake of law, such an action will not lie against the sovereign, unless the sovereign has consented to be sued. Counsel for the Commission argues that while the Hepburn Act, Commerce Court Act, and the Urgent Deficiencies Act are general in their terms, in so far as the injunction provisions are concerned, nevertheless, they were intended to designate a forum and to provide a form of procedure, and not to create a new cause of action. They were directed primarily to orders involving the interest of shippers and carriers, and it should not be assumed, from the mere fact that the language is general, that the Government intended to thereby waive its sovereign rights or to submit itself to be sued. This argument is somewhat difficult to sustain in view of the fact that under the Urgent Deficiencies Act, there is an express direction

that the suit shall be brought against the United States. Counsel argues, however, that this was upon the assumption that the United States was to defend as a representative of the public, and not in its sovereign capacity or as the real party in interest.

This argument might have more weight if the Government had previously preserved its immunity from suit. But it had not done so. As long ago as March 3, 1887, Congress had given the Court of Claims jurisdiction to hear and determine equity suits against the United States, founded upon a law of Congress, or upon a contract express or implied (Jud. Code, Sec. 145, 36 Stat., 1135). It has been held that the jurisdiction of the Court of Claims under this statute was limited to causes of action involving money only. United States v. Jones, 131 U. S. 1. But where the basic controversy involves money only, the jurisdiction seems to extend to all forms of equitable relief. For example, it extends to a suit against the United States for the reformation of a written contract. *District of Columbia v. Barnes*, 197 U. S. 146; *United States v. Milliken Imprinting Co.*, 202 U. S. 168; *Ackerlind v. United States*, 240 U. S. 531. Similarly, we believe that the Court of Claims would have had jurisdiction over a suit against the United States for the cancellation of a written instrument involving the payment of money only. In 1906, therefore, such actions were sustainable against individuals in the ordinary courts of equity, and against the United States, in the Court of Claims.

This was the situation when the Hepburn Act was passed declaring that jurisdiction of actions to set aside orders of the Commission was vested in the circuit courts. Later, the Urgent Deficiencies Act vested this jurisdiction

in the district courts and provided that the action should be brought against the United States. It seems futile to argue, therefore, that an action to set aside these particular orders can not be brought in the district court, when the Urgent Deficiencies Act expressly declares that actions to set aside any order of the Commission shall be brought against the United States in the District Court. Congress then submitted the amount of the guaranty to determination by Commission order, having previously declared that Commission orders may be enjoined by suit against the United States. Its consent to be sued therefore seems very clear.

If counsel's argument is sound, then a rate order of the Commission in which the United States is interested as a shipper could not be set aside in the district court. This is clearly going too far. Even if the Court of Claims Act had never been passed, the Urgent Deficiencies Act of 1913 is clearly broad enough to cover a Commission rate order, even though the United States were the complaining party before the Commission. The Urgent Deficiencies Act applies to *any* order of the Commission, and directs that the suit be brought against the United States. It would be a most strange construction to urge that the Act does not mean what it plainly says, merely because the United States, itself, happens to have a substantial interest in the controversy.

If Counsel's argument is sound, then the case of *Dayton Goose Creek Railway v. U. S.*, 263 U. S., 456 should not have been brought in the district court, because that involved a controversy which was wholly between the carrier on one side and the United States, as the substantial party in interest on the other. That case involved an

order for the payment of the excess earnings by the carrier to the Government, under the recapture provisions of the Interstate Commerce Act. And while the injunction was refused, the jurisdiction of the District Court to consider the case upon its merits was sustained.

CONCLUSION.

We submit that any instrument, signed by the Commission, and creating a cause of action, or definitely affecting the legal status of the parties is an "order." We submit that, so far as equitable jurisdiction is concerned, orders of the Commission can be divided into not more than two classes: (1) those which have only *prima facie* weight and as to which an edequate remedy at law is provided and (2) all others. So far as equity jurisdiction is concerned, it is not sound to classify them as between orders for the payment of money and other orders. Whether they are made under the Interstate Commerce Act, Post Office Appropriation Act, the Transportation Act, the Safety Appliance Act, the Boiler Inspection Act, or any other statute, is not a sound basis of classification. Nor is it sound to classify them according to whether the United States has a substantial interest.

Orders coming under class (1), that is, those that have only *prima facie* weight, and as to which the defense at law is provided, may or may not be subject to cancellation in equity. We believe that they are and the Commerce Court has so held. However this may be, orders under class (2), which have more than *prima facie* weight, are subject to cancellation in equity, whether they are for the payment of money or otherwise, whether they arise under the Interstate Commerce Act or some other act,

and whether the United States has a substantial interest or is merely representing the public. Under the terms of the Urgent Deficiences Act, the district courts have jurisdiction of such actions, and they must be brought against the United States.

We submit that the judgment of dismissal rendered in the court below should be reversed and the case remanded to the District Court, with instructions to consider the alleged errors of law upon their merits.

The Merits.

While the motion to dismiss has the effect of a demurrer to the bill, and might have been granted upon the ground that, even if the court had jurisdiction, the petition does not state facts sufficient to constitute a cause of action, the lower court did not in fact give any consideration to the latter question, and we assume that this court will not care to consider it here for the first time. We have, therefore, discussed the case upon the merits very briefly, and only in our original brief.

We would like to add here, however, a comment upon *Northern Pacific Ry. Co. v. Interstate Commerce Commission*, 23 Fed. (2nd) 221, in which the District Court of Appeals held, in a case brought by the Northern Pacific Railway Company, that a certificate for partial payment under section 212 of the Transportation Act, was not conclusive and that the Commission had jurisdiction later to make a final certificate for a smaller amount. The reason stated by the Court is that, in the nature of things, the Commission could not be certain that any part of the Guaranty was due until it was certain of the whole. This

is clearly fallacious. It is obvious that where the total items claimed, aggregate 17 or 18 million dollars, it might be entirely possible that the Commission will feel certain as to twelve and one-half million dollars and doubtful as to five or six million. This is exactly how it felt in our case. Of course, it is possible that, in finding that a part of the items at least are certainly due, the Commission may be mistaken. It is equally true that it may be mistaken in making its final certificate. Both parties assume the chance of that. But this does not alter the fact that it is just as possible for the Commission to reach a certain conclusion as to some items, while remaining doubtful as to others, as it is to finally reach a certain conclusion as to all items. It seems, therefore, that the reasoning of the District Court of Appeals is not sound.

Since filing our original brief, we have examined the debates in the House of Representatives upon the Winslow Bill, which was H. R. 15836, and which was subsequently enacted as Section 212 of the Transportation Act. These debates make it certain beyond the possibility of a doubt that the construction which we place upon Section 212 is exactly the construction that Congress intended. We have added an Appendix "C" to this brief containing extracts from the debate as it appears in the Congressional Record. It appears from these extracts that opponents of the Bill repeatedly pointed out that it would give to the Commission's Certificates of partial payment up to the amount of partial payment certified, a finality and conclusiveness equal to that of a final certificate under Section 209 (g), and that the Commission would have

no power, later, to make a final certificate for a smaller amount or to recover the excess. In reply, the supporters of the bill repeatedly pointed out that this was exactly the effect intended. They insisted that when Section 209 (g) was originally enacted, Congress had intended that that paragraph itself should have this very effect. It provides that the Commission may certify, not a single amount, but the "several amounts" necessary to make good the guaranty and that the Secretary of the Treasury might draw, not a single warrant, but "warrants." The Commission had construed section 209 (g) in this same way, and had issued definite certificates for partial payment accordingly. However, the Comptroller of the Treasury had ruled that Section 209 (g) authorized only one final payment, and refused to honor a certificate for a partial payment drawn under this section. The District Court of Appeals of the District of Columbia refused a writ of mandamus to compel the Secretary of the Treasury to issue such a partial warrant, and it was for the purpose of meeting this situation that the Winslow Bill was introduced. The report of the Committee on Interstate Commerce to the house, on H. R. 15836, states that the purpose of the Bill is to authorize the Interstate Commerce Commission to certify partial payments to carriers under Sections 204 and 209 of the Transportation Act of 1920, the Comptroller of the Treasury having ruled that such sections authorized only one final payment.

The supporters of the Winslow Bill repeatedly asserted in debate that there was no more danger of a mistake in a partial certificate, than there was in a final certificate; that the Commission could be trusted to make a partial certificate definitely and correctly, as fully as it could be

trusted to make a final certificate; and that there was no reason why the possibility of an excess payment should be considered or provided for.

During the course of the debate, Representative Barkley offered the following amendments to be inserted at the end of paragraph A, Section 212: "before making such payment or drawing such warrant, unless it be on a final settlement, the Secretary of the Treasury shall require the carrier to execute a contract on such security as the Secretary of the Treasury may determine, providing that upon final determination of the amount of the guaranty under sections 204 and 209, such a carrier will repay to the United States any amounts which it may receive from such partial payment in excess of the guaranty, with interest at the rate of 6% per annum from the time such excess was paid."

After a lengthy debate, the above amendment was voted down by a vote of 115 to 65.

There was no similar debate in the Senate, but the above debate in the House and the proposed amendment, were reported in the Congressional Record before action was taken upon the Bill by the Senate.

We can see no ambiguity in the terms of the Bill itself, but if there is any, this debate, and the rejection of the proposed amendment, seem to make the intention of Congress clear beyond any possibility of a doubt.

In addition to the several decisions cited in our original brief indicating that no board or tribunal which has once made an award for a definite amount can later make an award for a different amount covering the same items, we should like to add two decisions in the District of Columbia, holding that when a statute confers jurisdic-

tion upon the District Commissioners to make a certain finding, and they do in fact make a finding as authorized, their authority is exhausted and they cannot thereafter change their findings. *Rudolph et al v. Timothy Brosnam*, 41 Wash. Law Rep., 755; *McFarland v. P., B. & W. R. Co.*, 37 Wash. Law Rep., 129.

These decisions would seem to be authority for our contention that the Commission's certificate of $12,500,000, dated March 1, 1921, was final up to that amount, and could not thereafter be reduced.

Respectfully submitted,

F. G. DORETY,
THOMAS BALMER,
FLETCHER ROCKWOOD,
Solicitors for Appellant.

APPENDIX A.

EXTRACTS FROM HEPBURN ACT (34 Stat., 584).

"SEC. 16. That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such an order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.
* * *

"In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be

joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment, in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff. * * *

"It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect. * * *

"If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same,

the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus. * * *

"The venue of suits brought in any of the Circuit Courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts."

APPENDIX B.

EXTRACTS FROM URGENT DEFICIENCIES ACT OF 1913 (38 STAT., 208).

The Commerce Court, created and established by the act entitled "An Act to Create a Commerce Court and to amend the act entitled 'An Act to Regulate Commerce,' approved February 4, 1887, as heretofore amended, and for other purposes," approved June 18, 1910, is abolished from and after December 31, 1913, and the jurisdiction vested in said Commerce Court by said act is transferred to and vested in the several district courts of the United States, and all acts or parts of acts in so far as they relate to the establishment of the Commerce Court are repealed.

* * *

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall

be construed as meaning final destination of such shipments.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. * * * The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within 30 days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of

any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within 60 days after the entry of such final judgment or decree, and such appeal may be taken in like manner as appeals are taken under exsting law in equity cases.

APPENDIX C.

EXTRACTS FROM CONGRESSIONAL RECORD, VOL. 60, PART 3, CONTAINING DEBATE IN HOUSE OF REPRESENTATIVES ON H. R. 15836 (SECTION 212, TRANSPORTATION ACT 1920) IN WHICH REPRESENTATIVES OPPOSING THE BILL POINTED OUT THAT IT WOULD HAVE THE EFFECT OF MAKING PARTIAL CERTIFICATES CONCLUSIVE, WITHOUT THE POSSIBILITY OF REFUND IN THE EVENT OF ERROR, AND IN WHICH SUPPORTERS OF THE BILL POINTED OUT IN REPLY THAT IT WAS THE INTENTION TO MAKE THE PARTIAL CERTIFICATES JUST AS BINDING PRO TANTO AS A FINAL CERTIFICATE.

Mr. Barkley said, page 2737:

"This Bill no where protects the United States Government. Under sub-section (h) of Section 209, which authorized the Secretary of the Treasury to pay out advancements as recommended by the Interstate Commerce Commission during the six months Guaranty Period, it was provided that before these advancements should be made by the Secretary of the Treasury, he should have the power to require the railroads involved to give bond that if the Government under the advancement paid more than was due the road would pay back the excess with interest at the rate of 6%."

Mr. Cooper said, page 2738:

"The Interstate Commerce Commission in its last annual report recommends legislation of this character. I quote from page thirty of this report in which the Commission says:

'The immediate payment to some of these carriers of the amounts or parts of amounts which we can now de-

termine to be certainly due them under the Guaranty provisions of the Transportation Act, 1920, is vital to their meeting operating expenses, fixed charges, and other obligations which they must meet in order to properly serve the public as common carriers'."

Mr. Sims said, page 2739:

"This bill provides no protection to the Government in case of excess payments on certificates. It provides that the Interstate Commerce Commission certificates must be paid in full and no return whatever to the Government is provided for such excessive payment. * * * Why did you a few months ago think that the public deserved the protection of a contract with security to return excess in advances and now provide that no return of the excess on the certificates for payment of guaranty is to be secured, as was required for excess advances during the Guaranty Period?"

On page 2740, appears the following:

Mr. Montague. I understand from the gentlman's position that the bill does not enlarge or diminish the existing guaranty, but simply enables the Government to make several payments instead of one payment in settlement of such Guaranty?

Mr. Winslow. Stated with absolute accuracy.

Mr. Griffin of New York said, page 2801:

"I call the attention of the committee particularly to what in my opinion is serious oversight, and that is the failure to provide against errors creeping into the estimates upon which the partial payments are made. * * * For instance if you were building a house and enter into an agreement with the builder to pay him certain partial payments as the work progresses, what would you think

of a lawyer who would draw the contract so as to compel you to make partial payments until the aggregate total was paid to the builder before the accounts between you were finally adjusted and determined. * * * I have an amendment to propose which will safeguard the Government to the modest extent of 10%, and I suggest that in these partial payments paid to the railroads, we ought to reserve at least 10% holdback until the accounts between the Government and the companies are finally adjusted."

Mr. Merritt, page 2802, said:

"I ask your careful attention to the terms of the certificate which the Interstate Commerce Commission gives for these partial payments. It is this:

'The Commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of ..... is necessary to make good to said carrier the guaranty provided by section 209 of the Transportation Act of 1920.

The Commission hereby certifies that such amount of ..... cannot be reduced by further accounting or otherwise, and there might be upon further investigation additional amounts found due said railroad company * * *.'

So the Interstate Commerce Commission certifies that there cannot be an amount less than they certified. Therefore, there is no risk; there is no sense in asking for any bond, any more than there is for asking for bonds on payments of any other judgments, and there is no sense in taking security for any part of the partial payments."

The following occurs on page 2802:

Mr. Montague. As I understand it, there is no bond required if there were only one final payment.

Mr. Merrit. None.

Mr. Montague. And you simply ask that the same rule apply here?

Mr. Merrit. Certainly.

Mr. Barkley said, page 2803:

"I think that when the railroad with the certificate of the Interstate Commerce Commission goes to the Secretary of the Treasury and asks for a partial payment on an account, that is as yet undetermined, the Secretary of the Treasury ought to be authorized to require a bond that if in the final settlement it turns out that the partial payments amount to more than the road was entitled to, or would be entitled to under final payment, the road should pay back to the Government the excess with interest from the date of payment * * *."

The following appears on page 2803:

Mr. Hardy (of Texas). Does not subsection (b) foreclose the Government in any error forever thereafter?

Mr. Barkley. That is my understanding.

Mr. Esch said, page 2807:

"Mr. Chairman, paragraph (g) of Section 209 contains the paragraph which authorizes the making of partial payment to the roads. I want to read it in order to show the justification for the making of such payments:

'The Commission shall, as soon as practicable, after the expiration of the Guaranty Period, ascertain and certify to the Secretary of the Treasury the several amounts'—using the plural—'necessary to make good the foregoing guaranty to each carrier.'

These several amounts are necessary to make good the foregoing guaranty to each carrier. The natural implication would be that there would be more than one warrant for each carrier. It goes on and says further:

'The Secretary of the Treasury is authorized and directed thereupon to draw warrants'—in the plural—'in favor of each such carrier upon the Treasurer of the United States.'

The strong inference is that the language of the Transportation Act justified the Interstate Commerce Commission in certifying for partial payments. And the Commission was surprised when the Comptroller of the Treasury handed down a decision to the effect that one final settlement must be made, with only one certificate. Surely, we who had helped to frame this bill, when we framed this sub-section, understood and believed that the right of making a certificate for partial payment was unquestioned, but the Commission making a like interpretation followed that practice and issued more than one certificate. Be that as it may, we are trying now to clarify that section * * *."

On page 2808, Mr. Montague said:

"What does the Interstate Commerce Commission say?"

Mr. Clark, the Chairman of that Commission may be quoted * * *.

"We never conceived that there was any question of our power to certify an amount certainly due to a carrier under paragraph (g) of Section 209, even though it was not final and complete certificate, until the Secretary of the Treasury declined to recognize certificates of that nature which we would issue * * *.

Now if I am correct in that, then this bill simply carried into the law what was thought by most competent authority to have already been contained in it * * *."

On pages 2808 and 2809, the following appears:

Mr. Hastings: The point I was getting at was if it was thought necessary at that time to protect the Government by a bond given for advancements during the period of Guaranty, why was it not put into this bill?

Mr. Montague: I do not understand that the bill states it correctly that these are advancements; they are payments on account of money due and no bond will be required.

Mr. Barkley: If the gentleman will permit, the law required that for advancements during the six months period, they were required to give bond for repayment of any excess.

Mr. Montague: The gentleman is correct but that does not pertain to the final account.

Mr. Barkley: Oh, no.

Mr. Montague: And if we are not required to give it on a final account, why should we on a partial account?

Mr. Dempsey said, page 2809:

"Now, the gentleman from Tennessee (Mr. Sims) makes two objections. First, he assumes that the Interstate Commerce Commission is to make some fatal error and he wants to defer that judgment. Is the question to be referred to some other body? Is it to be referred to the Supreme Court? Why, if it is to be determined anyway, in the end by the Interstate Commerce Commission—you have the same Commission, you have the same facts, and is the gentleman assuming that on the same state of facts, the same body will give an erroneous judgment at one time and a correct judgment at another * * *".

The following appears on page 2809:

"Mr. Reavis: * * * If we pay more under the estimate than we owe and have agreed to what has the Interstate Commerce Commission to do with it?

Mr. Dempsey: Why, the Interstate Commerce Commission issue a certificate upon the facts, and its decision is made upon all of the data obtainable.

Mr. Reavis: But if we pay more than is due?

Mr. Dempsey: We are just as likely to be right now as at any time in the future."

On page 2812 appears the following:

"Mr. Barkley: Mr. Chairman, I offer an amendment. * * * At the end of line one, page 2, insert: 'Before making such payment or drawing such warrant, unless it be upon a final settlement, the Secretary of the Treasury shall require the carrier to execute a contract on such security as the Secretary of the Treasury may determine, that upon final determination of the amount of the guaranty under sections 204 and 209, such carrier will repay to the United States any amounts which it has received from such partial payment in excess of the guaranty with interest at the rate of 6% per annum from the time such excess was paid."

Mr. Barkley: Mr. Chairman, this amendment carries out the provision which the Transportation Act carries in subsection (h) of Section 209, which authorizes the Commission to certify advancements to the Secretary of the Treasury where it is necessary to pay fixed charges and operating expenses.

Mr. Winslow said, page 2812:

"Under the provisions of the Transportation Act, the amount arrived at and which could be put forward as an advance was the estimated amount, and for that reason of estimate, in order to protect the Government, the conditions of the bond or security to cover are provided in the law.

Now, in this instance, we have another situation. Whatever amounts will be paid under the Bill before us will rest upon amounts which have been carefully canvassed, and which have been worked out to the satisfaction both of the debits and credits. There is a very different situation indeed."

Mr. Barkley said, page 2813:

"But suppose it turns out afterwards that there is a mistake, and suppose that the railroad has put something over the Interstate Commerce Commission in arriving at the estimate. Then under the language of this bill that estimate which has been arrived at must be final settlement as to that item, and the Government has no recourse to offset that claim against another claim that may be adjusted in the future. Therefore, I think it is very important to require that the railroads shall be required to give bond so that if they are overpaid the excess shall be returned to the Government * * * but if it should be determined that the railroad had been paid less than it was estimated it should be paid, I think the Government would be under obligation to pay it. I doubt seriously if these debits and credits ought to be binding either upon the railroad or government except when the railroad makes its final settlement.

Mr. Denison: Then, there would be no compromise, and the railroads and the government would have to wait until the final settlement was determined. The purpose of this bill is to encourage early settlements.

Mr. Barkley: This bill will not encourage early settlements. If you strike out the language making it final as against both railroads and government, you will leave them free to offset these claims against each other. But of you leave the language like it is, you have this situation; every road will insist upon settling each one of these items at a time, and when one of them has been settled, the Government is bound by that settlement.

Mr. Denison, page 2813, said:

"The Interstate Commerce Commission is the tribunal which we have entrusted with the authority to make these final settlements, and if we can depend upon them to protect the interests of the Treasury in making final settlements, it seems to me we can very well do so in making partial settlements.

Mr. Barkley: But the Interstate Commerce Commission is liable to make mistakes as well as anybody else, and these accounts will be audited by individuals in the Interstate Commerce Commission. Does the gentleman think that the Government should be protected if it should occur that a mistake was made?

Mr. Denison: We have got to reach settlements some time. I was informed this morning that the accounting department of the Interstate Commerce Commission is the finest accounting institution of its kind in the United States if not in the world, and if we cannot depend upon it to safeguard the interests of the Treasury in making these settlements, then we ought to endeavor to provide some tribunal upon whom we can depend.

On page 2814, is the following:

Mr. Cooper: Mr. Chairman, the amendment which the gentleman from Kentucky (Mr. Barkley) offers was thoroughly discussed by the Committee during the consideration of this bill. I want to read you what Mr. Robinson, representative of the short line roads, said relative to this question:

"If a law should be enacted requiring the short lines and weak roads to guaranty repayment to the government in case of a mistake by the Government itself, it would be a very serious burden * * *."

Mr. Bee: Does not the gentleman think that if the Government of the United States should pay in excess of what they owe the railroads, the government of the United States ought to have the right to institute the necessary proceedings to recover from the railroads the amount improperly paid, and in that event would not the government of the United States be entitled to judgment and execution to collect the amount?

Mr. Cooper: The gentleman from Ohio is agreed and is entirely willing to let the Interstate Commerce Commission make a settlement of these payments for our Government. They are the authority that has the power to negotiate questions of this kind. I am not afraid that the Interstate Commerce Commission will permit any overpayments on these partial payments which the railroads are now asking.

On page 2815, the following appears:

"The question was taken; and on a division (demanded by Mr. Barkley) there were—ayes 65, noes 115.

Mr. Griffin said, page 2818:

"And I note that in the talks upon this measure today men with tears in their eyes emphasized the fact that it is only a question of how much money we owe the railroads, that it is due them, and that you are playing fair when inserting the proviso "definitely ascertained." Of course, after the amount is definitely ascertained, there is nothing to do but to pay it. That ought to satisfy any skeptic. That qualification is found in the first paragraph which states:

"In making certificates under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Co., may make its certificate for any amount definitely ascertained by it to be due."

Now, my amendment proposes that you put yourselves in the place of the Government and reserve 10% to safeguard the Treasury of the United States against possible error, fraud, deceit, or mistake. * * *.

The question was taken, and the amendment was rejected.

As the Winslow Bill was introduced, paragraph (b) provided that the Commission's "reasonable estimate" of the net effect of deferred debits and credit items, when agreed to by the carrier could be used as a dfinitely ascertained amount and that such estimate so agreed to "shall be binding in final settlement." Mr. Dewalt offered an amendment striking out the word "binding" in the last line and inserting the words "prima facie but not conclusive evidence of their correctness in amount." This amendment was debated on pages 2815 and 2816 and was

adopted by a vote of 116 ayes, and 95 noes. Thus Congress drew a distinction between deferred debit and credit items mentioned in paragraph (b) which in the nature of things could not be definitely ascertained, and all other items, covered by paragraph (a), which could be definitely ascertained. The deferred debits and credits were made "prima facie but not conclusive" while the definite ascertainment of all other items, under paragraph (a), were left conclusive and binding.